IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-

GEORGE WASHINGTON MILLER,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION OF GEORGE WASHINGTON MILLER

FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF OHIO

Petitioner George Washington Miller, convicted of aggravated murder and sentenced to die in the electric chair, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in this proceeding on March 9, 1977, whereby his conviction and sentence were affirmed.

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported at 49 Ohio St. 2d 198, 361 N.E.2d 419 (1977), and a copy is included in the appendix hereto. The opinion of the Clark County Court of Appeals is unreported and a copy is included in the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 9, 1977. An order extending the time for filing this petition for a writ of certiorari until August 6, 1977, was granted by Mr. Justice Stewart on May 26, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) and Part V of the Rules of this Court, petitioner asserting

here and having asserted below a deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether petitioner's constitutional right that guilt be proved beyond a reasonable doubt was violated by his conviction on the basis of insufficient fingerprint evidence.

2. Whether the procedure of imposing the sentence of death for the crime of aggravated murder under the law of the State of Ohio violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

3. Whether petitioner's sentence of death violated his rights under the Eighth and Fourteenth Amendments to the Constitution, because the Ohio death penalty statute does not permit the sentencing authority to consider the weight of evidence of guilt in determining the existence of mitigating circumstances.

4. Whether petitioner's sentence of death violated his rights under the Eighth and Fourteenth Amendments to the Constitution, because the Ohio death penalty statute precluded the sentencing authority from considering petitioner's mental and emotional condition as a mitigating factor.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Ohio Law:

> Ohio Rev. Code Ann. Sec. 2903.01. Aggravated murder.
>
> (A) No person shall purposely, and with prior calculation and design, cause the death of another.
>
> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
>
> (C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.
>
> * * *
>
> Ohio Rev. Code Ann. Sec. 2929.02. Penalties for murder.
>
> (A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.
>
> * * *
>
> Ohio Rev. Code Ann. Sec. 2929.03. Imposing sentence for a capital offense.
>
> . . . .

(C) . . . If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

. . . .

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the argument, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

* * *

Ohio Rev. Code Ann. Sec. 2929.04. Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count

in the indictment pursuant to section 2941.14 the Revised Code, and is proved beyond a re sonable doubt:

. . . .

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing, immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is likely that the offense would not have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

STATEMENT OF THE CASE

Petitioner George Washington Miller, a 26 year-old black man, is one of seventy-two men and three women presently under sentence of death in the State of Ohio. On August 28, 1975, the Clark County, Ohio, grand jury charged petitioner with separate counts of aggravated murder, aggravated burglary, and aggravated robbery. On November 18, 1975, petitioner was convicted of all three counts.

The penalty trial resulting in the death sentence was conducted on December 19, 1975. His sentence and conviction subsequently were reviewed and upheld by a five to two decision of the Ohio Supreme Court, the dissenters concluding that the evidence was insufficient to support the conviction. On March 24, 1977, the Supreme Court of Ohio stayed execution of petitioner's sentence pending disposition of this petition.

Trial on the Charges: The Crime

At trial the State showed that on August 13, 1975, at 2:41 a.m., the Springfield, Ohio police responded to a burglar alarm at a local Twin Fair store, App. pp. 1-2,[1/] and discovered inside the store the body of the store's evening maintenance man. App. p. 5. The victim was shot with .22 caliber bullets, and his own .22 revolver, which he carried at work, was missing from the scene of the crime. App. pp. 13-14. The revolver was never found. App. p. 6. The victim also suffered severe lacerations on the head. App. pp. 34-35. The police found two bloodstained short-handled hatchets near the body. App. pp. 9-10, 19-21. The hatchets and the revolver evidently were the murder weapons. App.

1/ The relevant pages of the trial transcript are reprinted in the appendix hereto. Page references refer to pages in the appendix.

p. 36. The State's pathologist testified that the lacerations and the bullet wounds were inflicted at separate times and from several different directions. App. p. 37. He admitted that it was possible that the victim may have been attacked from different directions at the same time. App. p. 38.

On responding to the burglar alarm, the police discovered the rear hangar door of the store building partly open. App. p. 4. Just outside the door were four gym bags containing store merchandise. App. pp. 2-3. Within the store, but near the hangar door, the police discovered two locks forced open. These locks had been used to fasten the door from the inside. App. p. 11. In this same area was an opened cardboard package containing hacksaw blades. App. p. 11.

Further inside the store, near the victim's body, the police found a long-handled axe. App. p. 12. An adjacent glass display case containing store merchandise was broken, and glass slivers were found on the handle of the axe. App. pp. 24-26. It may be inferred that the axe was used to break the case.

Finally, on an adjacent rooftop, the police discovered a bloodstained shirt and a pair of bloodstained

shoes. App. pp. 7-8. Initially police chemist John Brown testified that the blood on these objects was Type O, App. pp. 18-21, and pathologist Dr. Simeon Palomino testified that the victim's blood was Type A. App. p. 53. When recalled by the State, Mr. Brown changed his testimony so that the blood types were said to coincide. App. pp. 46-47.

Trial on the Charge: The Fingerprint Evidence

The police obtained a total of approximately one hundred fingerprints, App. p. 39, from "many articles" found at the scene of the crime. App. p. 23. These items included objects within the four gym bags, App. p. 40, the cardboard package containing hacksaw blades, App. p. 33-34, one of the blades, App. p. 16, and the long-handled axe, App. pp. 41-42.

The police either did not find or did not identify (the record is silent on this point) any fingerprints on the bloodstained hatchets, on the bloody shirt, or on the bloody pair of shoes found on the adjacent rooftop.

The police searched their local records to match the one hundred fingerprints. After examining by hand approximately five hundred of nearly fifty thousand recorded prints, App. pp. 44-45, the police discovered what they believed to be a match for three of the prints they had obtained. App. p. 30. These three, the State's witness

testified, were petitioner's. App. pp. 28, 29-30, 33-33a. The State based its case against petitioner on virtually nothing other than these three fingerprints. (No witnesses to the crime were produced at trial.)

None of the fingerprints identified by the police as belonging to petitioner related to objects unequivocally involved in the slaying. All the fingerprints were on objects accessible to the public in the course of shopping. The State's fingerprint expert testified that the fingerprints could have lasted a year or more. App. p. 22. The petitioner took the stand, denied that he had anything to do with the killing, and testified that he "visited the store many times". He was there most recently in July 1975, only a month before the crime. App. p. 52.

The first of petitioner's fingerprints was found on a folded paper sack within one of the four gym bags discovered by the police outside the rear hangar door. App. p. 28. Police Officer Nelson Smith testified that the sack was probably normally accessible to shoppers. App. pp. 42a-42b. Furthermore, the police found other fingerprints on the paper sack, but were unable to identify them. App. pp. 42c-42d.

The second print was found on the cardboard packaging of a hacksaw blade package discovered by the police near the rear hangar door. App. pp. 33-34. The package's

plastic covering was open and a third print allegedly belonging to petitioner was found on one of the blades inside the package. App. p. 29. The majority of the Ohio Supreme Court conceded that "it is not clear whether the hacksaw was ever actually used on the locks [of the rear hangar door] to effect an apparent means of escape." App. p. 106. The store manager testified also that the hacksaw packages were handled by customers and were occasionally knocked to the floor by customers. App. pp. 48-49. In addition, as the dissent in the Ohio Supreme Court pointed out, the store manager "admitted that customers did break into packages of the type involved herein and that the policy of placing older items to the front of a display to encourage a quick sale was not strictly followed." App. p. 112. Moreover, the hacksaw package, like most of the objects evidently related to the crime, contained prints which the police failed to identify. App. p. 43.

The only evidence offered by the State, other than the fingerprints, concerned petitioner's shoe type and size. A footprint size 10-1/2 was found near the victim's body, App. p. 27, and the bloody shoes found on the roof appeared to be of this size. App. p. 27a. Petitioner, however, was shown to wear size 9-1/2 shoes. App. pp. 31-32. The State showed also that the desert boots he was wearing at the time

of arrest were similar to the type on sale at the Twin Fair store at the time of the crime. However, the store manager was unable to testify that any of the Twin Fair shoes--any size--were missing. App. p. 54.

Petitioner waived trial by jury. The three-judge panel ruled petitioner guilty of aggravated murder, aggravated burglary, and aggravated robbery.

The Penalty Trial: Petitioner's Background and Character

Prior to the penalty trial, the court requested a pre-sentence investigation and a psychiatric examination of petitioner, pursuant to Ohio Rev. Code § 2929.03(D). These reports were entered into the record at petitioner's penalty trial.

Petitioner has a ninth grade education and a record of sporadic employment in various low-paying jobs. App. pp. 70-71.[2/] His mother died when he was seven years old. When he was 12, his father and stepmother placed him in the Clark County Children's Home. App. p. 63. In 1966, at age 15, he ran away, was caught and was returned. There-

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2/ Relevant portions of the penalty trial transcript, the presentence report, and the psychiatric report are included in the appendix hereto. References are to page numbers in the appendix to this petition. The penalty trial transcript is not a part of the official record of the Supreme Court of Ohio, and the transcript is hereby lodged with this Court.

after he apparently was placed in the Fairfield, Ohio, School for Boys where he remained (with the exception of another sequence of escape, capture and return) until he was deemed an adult at age 18. App. pp. 61-62.

Petitioner is an epileptic. App. p. 68. He has suffered from chronic memory difficulties. App. pp. 83-84. The record does not reveal whether petitioner ever has been psychologically tested, but he was diagnosed by the court-appointed psychiatrist as a chronically depressed neurotic. App. p. 57. He has been institutionalized for mental care in the past and at least once has attempted to kill himself. App. p. 56. Except for the instant conviction, petitioner has had no history of violent crime. App. pp. 61-62.

The Penalty Trial: Psychiatric Testimony

On December 19, 1975, the same three-judge panel which convicted petitioner conducted a brief hearing to determine his penalty. Because petitioner's conviction included a finding of an aggravating circumstance, the only issue before the court was whether any mitigating circumstances were present.

The State offered no witnesses at all. Defense counsel called as if on cross-examination the doctor who had given petitioner a psychiatric examination, under court

order issued pursuant to Ohio Rev. Code § 2929.03. The psychiatrist testified that he had interviewed petitioner once, on December 4, 1975. App. p. 76. There is no record that petitioner was ever given any psychological tests or that his epilepsy was ever examined by a medical doctor.

The psychiatrist diagnosed petitioner as a chronically depressed neurotic. App. p. 80. He admitted that petitioner's conduct probably was a product of petitioner's mental condition:

> "Q: [Petitioner's counsel]: Do you believe that this chronic depressive neurosis as you have diagnosed it is either the cause or one of the causes of his criminal conduct in the past ten years?
>
> "A: [Dr. Fishbain]: I would say that's likely, that there is an association. How close it is I cannot say, but it is likely that there is.
>
> "Q: It is normal or would it be within the realm of normal mental activity for someone who is chronically depressed such as Mr. Miller has been for the bulk of his life to express or to act out these depressions by criminal conduct?
>
> "A: Again I think there could be an association. I just can't say exactly what the connection is at this point.

"Q: Is it possible that there is no connection between the depressive neurosis and these criminal activities?

"A: That would be unlikely. . . ." App. pp. 81-82.

The Ohio statute uses the terms "mental deficiency" and "psychosis" to guide examination of the subject's emotional and mental condition. The psychiatrist's understanding of the statutory definition of these terms restricted his further explanation of the causal relationship between petitioner's criminal activity and his mental condition:

"Q: [Petitioner's counsel]: If someone, and again please correct me if I'm misusing this terminology or using it clumsily or out of context, but would an accessive [sic] acting out of either or these tendencies suggest mental deficiency?

"A: [Dr. Fishbain]: I think the definition of mental deficiency in the statute refers to mental retardation. Mr. Miller is not mentally retarded.

"Q: Well, this definition, of course, is the one which we must use as a guideline in a hearing of this sort at least to my understanding." App. p. 85.

The Court, however, recalled the psychiatrist:

"JUDGE COLE: Just a minute. Will you resume the stand, please Doctor? As I understand it you didn't feel that Mr. Miller was mentally deficient using the definition that Mr. Busch gave you, but you included mental retardation?

"THE WITNESS: That's right.

. . . .

"JUDGE COLE: Okay. Does he have a mental deficiency?

"THE WITNESS: Your Honor, that's not a psychiatric term.

"JUDGE COLE: Okay. Does that mean you can't answer that question?

"THE WITNESS: I cannot answer it. I've looked at the statute many times and I'm always puzzled. I can say he is not mentally retarded from my point of view and he is not mentally ill." App. p. 86.

In his summation petitioner's counsel submitted that petitioner had to be considered mentally deficient. App. pp. 89-90. In rebuttal, the State's prosecuting attorney claimed that it was inconsistent for the defendant to seek mitigation, since he had contended that he was innocent of the crime. App. pp. 90-91. Further, the prosecutor asserted that "what the statute [concerning the mitigating

factor of] mental condition had in mind . . . is where that the mind is of such a state that the person is an almost idiot or imbecile person whose mental capacity itself doesn't really comprehend what they were doing in such a situation." App. p. 91.

That same day the three-judge panel issued a conclusory ruling that no mitigating circumstances had been proved. App. p. 96. No findings of fact were noted to support this conclusion. Petitioner was thus sentenced to death.

Ohio Supreme Court Review

On review, in a majority opinion joined in by five justices, the Ohio Supreme Court noted that the test was whether the circumstantial evidence was "sufficient to justify the trier of fact to conclude not only that the accused was at the scene of the crime when it was committed, but also that the accused was the criminal agent." App. p. 110. The Court held this test was met. Two justices dissented, noting that "circumstantial evidence in general is sufficient only if that evidence excludes every other reasonable hypothesis consistent with innocence." App. p. 113. Stating that the presence of petitioner's three fingerprints could be innocently explained, the dissent concluded that the majority had imposed "the death penalty

on evidence insufficient to sustain a conviction." App. p. 113.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner's first question involving the Due Process requirement that guilt be proved beyond a reasonable doubt results from his contention at trial and on review below that the evidence was insufficient to sustain a conviction and sentence of death. This claim was rejected by the Ohio Supreme Court on the merits. App. pp. 107-110.

Petitioner's remaining questions arise from his contention in the Ohio Supreme Court that the Ohio death penalty statute violates the Eighth and Fourteenth Amendments to the Constitution of the United States. This contention was considered on the merits and was rejected by the Ohio Supreme Court in reliance upon that court's previous decision in State v. Bayless, 48 Ohio St. 2d 73, 357 N.E.2d 1035 (1976). App. pp. 110-111.

REASONS FOR GRANTING THE WRIT

I

PETITIONER'S CONSTITUTIONAL RIGHT THAT GUILT BE PROVED BEYOND A REASONABLE DOUBT WAS VIOLATED BY HIS CONVICTION ON THE BASIS OF INSUFFICIENT FINGERPRINT EVIDENCE.

This Court made clear in In Re Winship, 397 U.S. 358 (1970), that the Due Process Clause of the Fourteenth Amend-

ment requires that the prosecution bear the burden of proving guilt beyond a reasonable doubt. See also Patterson v. New York, ___ U.S. ___, 45 U.S.L.W. 4708 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). In this case the State failed to meet this burden, because it did not show that the fingerprints allegedly belonging to petitioner were made at the time and place of the crime.

On review of this case, the Ohio Supreme Court conceded that under Ohio law "before fingerprint evidence may be used to support a conviction, such circumstantial evidence must exclude every other reasonable hypothesis except that of the defendant's guilt." State v. Miller, 49 Ohio St. 2d at 201, 361 N.E.2d at 422 (1977). See also State v. Sheppard, 165 Ohio St. 293, 135 N.E. 2d 340 (1956). The court applied this corollary to the "beyond a reasonable doubt" rule to this case as follows:

> "Fingerprints corresponding to those of the accused are sufficient proof of his identity to sustain his conviction where the circumstances show that such prints, found at the scene of the crime, could only have been impressed at the time of the commission of the crime, . . . [citations omitted] [emphasis supplied]." State v. Miller, 49 Ohio St. 2d at 202, 361 N.E.2d at 422.

Indeed, any other rule would mean that: "[a]nyone who touches anything which is found later at the scene of a crime may be convicted. . . ." Borum v. United States, 380

F.2d 595, 597 (D.C. Cir. 1967). See also United States v. Corso, 439 F.2d 956 (4th Cir. 1971); Hiet v. United States, 365 F.2d 504 (D.C. Cir. 1966).

The rule that fingerprints be tied to the crime by proof of time and place of impression may have been accepted by the Ohio Supreme Court, but it simply was not applied in this case. The State offered no evidence that petitioner was at the scene of the crime on the night of the crime or even that he left his residence that night. Nor did the State preclude the possibility that petitioner's fingerprints could have been placed on the folded paper sack during one of his shopping visits to the Twin Fair store--a policeman testified that the bag was one of a number accessible to the public. Further, the store manager conceded that such packages were handled by customers, that customers opened them, and that such packages were occasionally knocked to the floor by customers. Without contradiction, petitioner testified that he frequently shopped at the Twin Fair store. In fact, he was there only a month before the night of the crime. Finally, removing the lynchpin from the State's case, the State's expert admitted that the petitioner's fingerprints could have remained on the blade, the package and the paper sack for at least a year.

The State's attempt to tie the fingerprint evidence to the time and scene of the crime failed to eliminate a reasonable doubt. This Court may review such a denial of due process, and when this denial stems from a lack of evidence must reverse the ruling below. See Vachon v. New Hampshire, 414 U.S. 478 (1974); Garner v. Louisiana, 368 U.S. 157 (1961); Thompson v. Louisville, 362 U.S. 199 (1960). None of the three counts of petitioner's conviction can withstand this Court's scrutiny, and all must be reversed.

Furhermore, even if the State's evidence were somehow deemed sufficient to support petitioner's conviction of burglary or robbery, there is simply no evidence linking him to the slaying. The three fingerprints which constitute the entire case against petitioner were each found on items far removed from the victim. There was no evidence connecting petitioner to the immediate location of the slaying, or to the bloodstained clothes and shoes supposedly worn by the murderer. Therefore, it was a violation of the Due Process Clause for the trial court to conclude that the evidence showed beyond a reasonable doubt that petitioner "purposely" killed the maintenance man.

II

THE IMPOSITION OF THE SENTENCE OF DEATH FOR THE CRIME OF AGGRAVATED MURDER UNDER THE LAW OF THE STATE OF OHIO VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

On June 27, 1977, in the case of Bell v. Ohio, No. 76-6513, 45 U.S.L.W. 3840, this Court granted a writ of certiorari to decide whether the Ohio death penalty statute is unconstitutional.

Like Bell, petitioner has been convicted of aggravated murder and sentenced under the Ohio death penalty statute. Petitioner argued in the court below that the Ohio death penalty statute violated his rights under the Eighth and Fourteenth Amendments to the Constitution. This argument is asserted also in this Court. A determination in Bell that the Ohio death penalty statute is unconstitutional will control this case and will require that petitioner's sentence be vacated.

In this case, however, petitioner submits three additional arguments which will not necessarily be treated in Bell. First, petitioner's guilt was not proved beyond a reasonable doubt. Second, the weight of evidence of guilt should have been considered by the sentencing authority in

determining petitioner's sentence. Third, the sentencing authority failed to afford constitutionally adequate consideration to petitioner's emotional and mental condition in determining petitioner's sentence. It is submitted that these arguments independently merit hearing in this Court and that, therefore, this case is an appropriate companion case to Bell.

III

THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION REQUIRE THAT THE OHIO DEATH PENALTY STATUTE PERMIT THE SENTENCING AUTHORITY TO CONSIDER THE WEIGHT OF EVIDENCE IN DETERMINING THE EXISTENCE OF MITIGATING CIRCUMSTANCES.

A. The Appropriateness of Petitioner's Death Sentence Is a Matter of Total Uncertainty.

There can be no act of the criminal justice system more grievous than the execution of an innocent man. It is beyond doubt, however, that in the United States some individuals have suffered the death penalty for crimes they did not commit. As Mr. Justice Marshall has noted:

> "Our 'beyond a reasonable doubt' burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death." (Footnote omitted.) Furman v. Georgia, 408 U.S. 238, 366 (1972) (Marshall, J., concurring).

On numerous occasions, this Court has emphasized that in order to lessen the possibility of tragic error, a sentencing authority must be absolutely certain that the death penalty is appropriate in an individual case, if it is ever to be imposed. As Mr. Justice Stewart wrote for the plurality in Woodson v. North Carolina, 428 U.S. 280, 305 (1976):

> "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

And in Proffitt v. Florida, 428 U.S. 242, 249 (1976), the plurality quoted with approval the Florida Supreme Court's admonition that:

> "'[T]he facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.' Tedder v. State, 322 So. 2d 908, 910 (1975)."

The appropriateness of the death penalty for petitioner is a matter of total uncertainty, because the correctness of the underlying conviction is inescapably dubious. (Two members of the Ohio Supreme Court would have reversed the conviction on all three counts. State v. Miller, 49 Ohio St. 2d at 205-206, 361 N.E.2d at 424 (1977).)

Examined for its sufficiency as the necessary basis for the death penalty, the evidence against petitioner is simply not sufficient to support the awesome penalty imposed on him. Petitioner's fingerprints were not found on any item near the victim, but appeared only on the hacksaw blade and package some distance away and on the paper sack discovered in a gym bag outside the building. The State failed completely to refute the reasonable explanation that the fingerprints were placed on these objects during the course of one of petitioner's shopping visits to the store. Most telling of all, petitioner's prints were not found on the murder weapons or on the bloody shirt and shoes which were discovered on an adjacent rooftop.

The evidence supporting petitioner's conviction, however, was not discussed at all during the penalty trial, save for the prosecutor's suggestion that it was "inconsistent" for petitioner to seek mitigation of a crime he claimed he did not commit.[3/] The sentencing court was confined by law to a review only of evidence relevant to the seven aggravating circumstances and the three mitigating circum-

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3/ The prosecutor's comment illustrates that the Ohio death penalty statute is unconstitutional because it encourages a defendant to give up the right to jury trial in order to avoid the death penalty. See petition for writ of certiorari in Bell v. Ohio, 76-6513, page 27, cert. granted, 45 U.S.L.W. 3840 (1977).

stances. The aggravating circumstance that made petitioner eligible for a sentence of death (i.e., that the offense was committed while the offender was committing aggravated burglary or robbery) was proved as part of his offense and therefore was not discussed at the penalty hearing. The statute's list of mitigating circumstances did not permit consideration of the weight of evidence for conviction. Consequently, the prosecution was not obligated to present any of the facts of the crime at the penalty hearing, and none of the evidence which was presented relevant to mitigating circumstances concerned the weight of the evidence of the conviction.

B. A Constitutional Death Penalty Statute Must Permit Consideration at the Penalty Stage of the Weight of Evidence Supporting the Conviction.

This Court has approved only three death penalty statutes. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas 428 U.S. 262 (1976). All three provide for particularized review of the facts of the crime by the sentencing body. In Gregg, for example, both the prosecution and the defense argued the weight of the evidence to the jury at the penalty trial:

> "No new evidence was presented at the sentencing proceeding. However, the prosecutor and the

> attorney for petitioner each made arguments to the jury on the issue of punishment. The prosecutor emphasized the strength of the case against petitioner and the fact that he had murdered in order to eliminate the witnesses to the robbery. The defense attorney emphasized the possibility that a mistake had been made and that petitioner was not guilty." Gregg v. Georgia, 428 U.S. at 216 (White, J., concurring).

Further, the Georgia statute explicitly provides for review by the appellate court of the possibility that an innocent person may be executed. As Mr. Justice White explained:

> "To assist it in deciding whether to sustain the death penalty, the Georgia Supreme Court is supplied, in every case, with a report from the trial judge in the form of a standard questionnaire. Ga.Code Ann. § 27-2537 (1975 Supp.). The questionnaire contains, inter alia, . . . one question asking the trial judge whether the evidence forecloses 'all doubt respecting the defendant's guilt.'" Gregg v. Georgia, 428 U.S. at 211-212 (White, J., concurring)

As in Gregg, the weight of evidence against petitioner must be considered to limit the possibility of tragic error. The facts suggesting petitioner's conviction were simply not so clear and convincing that the most awesome of penalties can be reliably imposed on petitioner. See State v. Miller, 49 Ohio St. 2d at 205-206, 361 N.E.2d. at 424 (1977) (dissenting opinion). Suppose a witness comes forward to testify that a person unlike petitioner was at the Twin Fair store at the time of the murder. Suppose the Clark County police were to match the fingerprints obtained from the long-handled axe to another person and thereby

uncover an equally strong circumstantial case. Suppose another individual confesses to the crime. None of these possibilities can be reasonably foreclosed, given the evidence in this case. Yet, if petitioner's present sentence is carried out, the discovery that another person committed the crime which occurred on August 13, 1975, in the Springfield, Ohio, Twin Fair store will not spare petitioner. Such a discovery will only render petitioner's death an odious miscarriage of justice.

The validity of petitioner's conviction is marked by ineradicable doubt. Even if arguendo this doubt is deemed something less than that doubt which would require reversal of the conviction, nevertheless it is sufficient to destroy the certainty which must exist before petitioner can be lawfully executed. This doubt must not be suppressed by the sentencing court's unsupported leap from conviction to the death penalty.

The Ohio death penalty statute provides no opportunity for the sentencing court to consider the weight of evidence against petitioner in determining the existence of mitigating circumstances. The statute, therefore, is unconstitutional because it denies petitioner the individualized examination and careful scrutiny of his offense that the Eighth and Fourteenth Amendments to the Constitution demand. Woodson v. North Carolina, 428 U.S. at 303 (1976); Proffit v. Florida, 428 U.S. at 251 (1976).

IV

PETITIONER'S SENTENCE OF DEATH VIOLATED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION BECAUSE THE OHIO DEATH PENALTY STATUTE PRECLUDED THE SENTENCING AUTHORITY FROM CONSIDERING PETITIONER'S EMOTIONAL AND MENTAL CONDITION AS A MITIGATING FACTOR.

A. A Broad and Particularized Inquiry into a Defendant's Emotional and Mental Condition Is Mandated in a Capital Case.

The three death penalty statutes affirmed by this Court each permit particularized consideration of a broad range of possible mitigating factors. All the statutes provide for consideration of the emotional and mental condition of the defendant at the time of the crime. The Ohio statute is unconstitutional because, on its face and as applied to petitioner, it precludes adequate consideration of petitioner's emotional and mental condition.

In Georgia, the sentencing jury may consider any mitigating factor. Ga. Code Ann. § 27-2534.1(b) (Supp. 1975) As Mr. Justice Stewart has described the operation of the statute:

> "[T]he jury's attention is focused on the characteristics of the person who committed the crime: . . . Are there any special facts about this defendant that mitigate against imposing capital punishment

(e.g., . . . his emotional state at the time of the crime)." (Footnote omitted.) Gregg v. Georgia, 428 U.S. at 197.

In Texas, a defendant may "bring to the jury's attention whatever mitigating circumstances he may be able to show." Jurek v. Texas, 428 U.S. at 272. The Texas Court of Criminal Appeals has held that such circumstances include:

> "whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand." Jurek v. State, 522 S.W.2d 934, 939-40 (1975).

In Florida, two of the mitigating circumstances specifically enumerated by the death penalty statute are:

> "(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> . . . .
>
> "(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Flor. Stat. Ann. § 921.141(6) (Supp. 1976-1977) See Proffitt v. Florida, 428 U.S. at 249, n.6.

The Ohio death penalty statute not only fails to require broad consideration of mitigating factors of a defendant's emotional and mental condition, it bars such consideration. The Ohio Supreme Court has noted that the Florida statute upheld in Proffitt "permits consideration . . . of more broadly defined mental and emotional disturbances and impairments than does the Ohio statute." State

v. Bayless, 48 Ohio St. 2d at 73, 357 N.E.2d at 1046, n.2. Nonetheless, the court upheld the Ohio statute. The court thereby misjudged the import of the difference between the Florida statute and the Ohio statute. The difference is that between constitutionality and unconstitutionality.[4/]

B. The Ohio Statute's Third Mitigating Factor Precludes a Constitutionally Adequate Inquiry into a Defendant's Emotional and Mental Condition.

The Ohio statute restricts all examination of mitigating circumstances to an inquiry into only three factors. Two concern the nature of the crime itself and are irrelevant in this case. The third and final mitigating factor is the only one which concerns the individual character of the defendant. Unlike the three statutes upheld by this Court, the Ohio statute asks only if:

> "(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." Ohio Rev. Code § 2929.04(B)(3).

4/ The Florida statute was modeled after the Model Penal Code, Proffitt, 428 U.S. at 248 but the Ohio legislature rejected this model, apparently believing that Furman required the removal of as much sentencing discretion as possible from the judge and jury. See Lehman & Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 CLEV.ST.L.REV. 8, 20 (1974). The statute attacked herein had its basis in this misconception.

Ohio's third mitigating factor is constitutionally inadequate, first, because it requires the defendant to prove by a preponderance of the evidence that any single mitigating factor exists. Ohio Rev. Code § 2929.04(B). If the defendant fails to show, for example, that the "offense was primarily the product of" a defendant's mental condition, then the statute does not permit any consideration of such mental condition. No other death penalty statute upheld by this Court so restricts consideration of mitigating circumstances. Because proof of any degree of emotional or mental condition properly may contribute to the mitigation decision, Ohio's third mitigating factor is unconstitutionally narrow.

Ohio's third mitigating factor is inadequate, second, because it limits inquiry into a defendant's mental and emotional condition to a search for "psychosis" or "mental deficiency." The Ohio courts have sealed the statute's unconstitutionality by adopting severely restrictive definitions of both terms. The Ohio Supreme Court held in State v. Bayless, 48 Ohio St. 2d at 96, 357 N.E.2d at 1050-51 that "mental deficiency" is "a low or defective state of intelligence. . . . But it does not include the emotional and behavioral abnormalities claimed to exist by the defense."

Similarly, in this case the psychiatrist who examined petitioner assumed that "the definition of mental deficiency in the statute refers to mental retardation." The court in this case accepted this definition, and thereby refused to consider as possible mitigating circumstances (1) petitioner's epilepsy; (2) his severe memory difficulties; (3) his extremely poor educational background.

The statute's use of the term "psychosis" confirms the unconstitutionally restrictive scope of the Ohio mitigation scheme. The "psychosis" relevant under the statute must be a psychosis "insufficient to establish the defense of insanity". The Ohio courts, however, appear invariably to equate "psychosis" with the degree of insanity which establishes the defense of insanity. See Fortune v. Reshetylo, 33 Ohio St. 2d 22, 294 N.E.2d 880 (1974); State v. Jackson, 32 Ohio St. 2d 203, 291 N.E.2d 432 (1972); State v. Henley, 15 Ohio St. 2d 86, 238 N.E.2d 773 (1968). The equation of psychosis with the insanity defense also has been tacitly accepted on numerous occasions by this Court. See Lynch v. Overholser, 369 U.S. 705 (1962); Culombe v. Connecticut, 367 U.S. 568 (1961); United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953). In directing inquiry into forms of psychosis which do not constitute legal insanity, the Ohio death penalty points to a null set: there are no non-insane psychotics.

Furthermore, the effect of the statute's use of the term "psychosis" in this case was to negate consideration at the penalty stage of the entire psychiatric testimony concerning petitioner, simply because the psychiatrist diagnosed petitioner as a chronically depressed "neurotic." The Ohio statute's reliance on the distinction between "psychosis" and "neurosis" is misplaced. According to psychologists, the distinction may be nonexistent.[5/] In any event, it may be impossible to make the distinction with reliability,[6/] and the distinction may be irrelevant to an accurate description of a person's mental condition.[7/]

5/ See, e.g., the discussion in A. Beck, Depression: Causes and Treatment 77 (1967) ("In fact, a large number of writers on depression seem to accept the gradualist or unitory concept, viz., that the difference between neurotic and psychotic depression is one of degree, and that there is no more justification in constructing separate categories than there is for dividing scarlet fever into two groups such as mild and severe.")

6/ See P. Hoch, Differential Diagnosis in Clinical Psychiatry 579 (1972).

7/ The terms "psychotic" and "neurotic" fail to describe possibly determinative aspects of a defendant's emotional and mental condition. An example of the unconsitutionally restrictive effect of the Ohio statute's use of the term "psychosis" is State v. Harris, 48 Ohio St. 2d 351, 359 N.E.2d 67, 73 (1976). In that case, a psychiatrist characterized the defendant as a sociopath, but the court, noting that this diagnosis was listed under a category of "Non-Psychotic Mental Disorders" in the American Psychiatric Association's Diagnostic and Statistical Codes for APA-ICDA Mental Disorder (2d ed. 1971), apparently disregarded the psychiatrist's testimony, including further statements concerning the defendant's relative inability to control his actions. 359 N.E.2d at 73. See Hoch, supra note 6, at 760, 764.

Even if the pschosis-neurosis distinction were meaningful, its use still narrows unconstitutionally the statute's scope of consideration of mitigating circumstances. In this case, the court, the psychiatrist, and the parties were obliged by their understanding of the statute to ignore (1) the parameters of petitioner's mental condition, despite his severe impairments, (2) petitioner's record as a previous recipient of mental care, and (3) his suicide attempt. The statute thus failed, like the statute in Woodson v. North Carolina, 428 U.S. 280, 303 (1976), "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." See also Harry Roberts v. Louisiana, ___ U.S. ___, 97 S.Ct. 1993 (1977). The Ohio statute is unconstitutional, therefore, because it:

> "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson, 428 U.S. at 304.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the judgment and opinion of the Ohio Supreme Court.

Respectfully submitted,

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